No. 86-724

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HERAEUS-AMERSIL, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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THE ISSUES ARE RIPE FOR REVIEW

1. Customs Deliberately Refused to Make the Required Finding.

The government materially misstates the position the Customs Service had taken throughout this litigation as to why it departed from its prior classification practice. After conceding in its brief that it did in fact depart from such a practice here without explanation, Customs then goes on, in an apparent attempt to justify that failure, to claim falsely that Customs was prevented from giving an explanation by petitioner's own conduct in this litigation.

Nothing of the sort occurred, and the record is conclusive on this point. Rather, seeking to have this Court deny the writ, Customs has deliberately injected a non-existent issue.

The record incontrovertibly proves that, from the beginning of this litigation, Customs claimed that remand was inappropriate. (*See* Custom's Memorandum in Opposition to Motion to Strike; Custom's Reply [its Cross-Motion to Dismiss] at 13-14, n.8.) Only after Custom's motion to dismiss had been denied (Pet. App. 34a-47a) did it begin to reverse its position and first suggest remand as an appropriate remedy—a tactical reversal intended to avoid a finding by the Court of International Trade that a practice in fact existed. Even then, respondent sought to *avoid* remand by requesting that the Court first certify for interlocutory appeal the question of whether it could properly make that finding and, in so doing, issue a "stay of any remand pending the perfection and taking of an appeal." (Custom's Response in Opposition to Motion for Summary Judgment and Cross-Motion for Summary Judgment in its Favor, p. 23, n.21.)

Unquestionably, it is not "because the courts followed petitioner's urging that the Secretary has had no opportunity to explain why and whether a change is required," as is suggested by Customs (Resp. 8). Rather, the Secretary assiduously avoided making the finding with which he was—and is—charged under the law (19 U.S.C. §1315(d)) and procedurally sought to avoid being required to explain the reasons for the change.

The Secretary could, and should, have made this finding prior to imposition of a higher rate of duty, but did not. The lower courts so held. Indeed, he was required by law to have made the finding in response to petitioner's ad-

ministrative protest; but, as the Court below held, there was a "failure of the Secretary to act on the subject in any respect" (Pet. App. 8a). The Secretary had a further opportunity to explain his reasons when the issue was again raised by petitioner in a letter to Customs dated March 10, 1978. (Custom's Response to Statement of Material Facts ¶8). Again, the Secretary failed to do so. The issue of the existence of a uniform practice was then raised in petitioner's complaint, and the Secretary most certainly had the opportunity to determine whether an "established and uniform practice" existed and explain his reasons for departing from it prior to the filing of Custom's answer. Again, the Secretary did not do so, electing instead to take the position that he could avoid 19 U.S.C. §1315(d) by refusing to act, and further that the court lacked jurisdiction to do anything about it.

After the filing of the complaint, petitioner further pursued the issue of the existence of the practice, with its counsel supplying details in a series of nine letters over a period of nearly three months (*id.* at ¶5) of the "300 entries [which] were documented at the ports of Newark and John F. Kennedy International Airport (JFK)" (Pet. App. 3a), but to no avail.

Moreover, there is no statutory or regulatory prohibition against the making of such a "finding" by the Secretary at any time, despite the fact that the issue is in litigation. Contrary to Custom's assertion in its brief, the failure of the Secretary to make the finding of the existence of an established and uniform practice and to explain his departure from it are in no respect the fault of Petitioner.

Custom's suggestion that the Secretary's failure can somehow be cured by an explanation at a later trial on the

substantive issues in the case, some ten years or more after the issue first arose, is irrelevant. The law does not countenance such belated after-the-fact "justification" of the agency action taken. The required explanation must precede or accompany the action taken "[T]he grounds for an agency's disparate treatment of similarly situated applicants must be reasonably discernible *from its report and order*", *Contractors Transport Corp.* v. *United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (emphasis added), rather than be supplied after the fact. Otherwise, the lack of explanation *at the time of the agency action*—the defect which has led the courts to overturn so many agency actions—would in all cases be self-curing during the course of such litigation.

The Secretary in this case has avoided at all costs making a finding, despite repeated opportunity to do so. To hold that he may properly dodge such a finding and that the Courts cannot (as they did here) rule that the finding was required by law, "would render §1315(d) a nullity in the hands of a Secretary choosing to refrain from ever making a finding." *Ditbro Pearl Co., Inc.* v. *United States*, 515 F.2d 1157, (CCPA 1975) (Markey, C.J., concurring).

2. Customs Ignored the Governing Statute, Its Own Regulations and the Constitution.

By avoiding the "finding", the Secretary (a) has avoided the publication requirement of 19 U.S.C. §1315(d), (b) has avoided taking into account public comment, (c) has avoided explaining the reasons for the change, (d) has placed petitioner at an extreme disadvantage compared to its competitors, (e) has destroyed uniformity of customs classification contrary to the Constitution and (f) has set the stage for future Secretaries to avoid the required publication by refusals to make such "findings".

Seeking to avoid these conclusions, Customs misstates established law with regard to the application of 19 C.F.R. 177.10 to changes in a uniform and established practice. It cites *Rank Precision Industries, Inc.* v. *United States,* 660 F.2d 476 n.11 (CCPA 1981), for the proposition that §177.10 "is applicable only where the Customers Service has itself created an established and uniform practice by published ruling" (Resp. 6). But, that footnote refers only to the creation of a practice, not to a change in such a practice. Indeed, the note explains the difference in the creation process for the two "types" of uniform practice. Publication is required to create a practice under 19 C.F.R. 177.10(b), while no publication is required to create a practice *directly* under 19 U.S.C. §1315(d). Termination of either, however, requires publication.

19 C.F.R. 177.10 itself applies to practices created in either manner. "No published ruling under the provisions of this section will have the effect of changing either an earlier published ruling [which, under that same section (19 C.F.R. 177.10(b)) establishes a practice] or a practice established by *other means*" 19 C.F.R. 177.10(b) (emphasis added). The only means *other* than publication of a ruling to establish a practice is directly, pursuant to 19 U.S.C. §1315(d), by long continued and uniform classification.

3. The Record Does Not Establish That Customs Acted Uniformly in Terminating the Existing Practice.

Custom's spurious claim that, despite the findings of the lower courts to the contrary, the record established a lack of actual nonuniformity (Resp. 7) is absurd. It is also belied by reference of record to contemporaneous importations of fused quartz/fused silica by importers other than petitioner through the Customs Districts of Detroit, St. Albans, Vermont, Los Angeles, Boston, San Francisco and Buffalo.

CONCLUSION

19 U.S.C. §1315(d) was intended to effectuate the uniformity of tariff treatment mandated by the Constitution. But, if the Court of Appeals for the Federal Circuit is not reversed, then the Secretary of the Treasury may nullify that Statute at will merely by failing, or, as he did in this case, intentionally refusing to make the finding with which he is charged under Section 1315(d). This leaves imports by different importers, or in various parts of the country, to be treated differently, on an individual basis at the whim of the Customs officials rather than uniformly as the Constitution and this Statute intended.

Accordingly, a writ of certiorari should issue to the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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